

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 BERIHU HADERA FKADU,  
12 Booking #1551332,

13 Plaintiff,

14 vs.  
15

16 SAN DIEGO COUNTY, et al.,  
17

18 Defendants.  
19  
20

Civil No. 07-2116 JM (CAB)

**AMENDED ORDER DENYING  
MOTION TO PROCEED *IN FORMA*  
*PAUPERIS* AS BARRED BY 28  
U.S.C. § 1915(g) AND DISMISSING  
CIVIL ACTION WITHOUT  
PREJUDICE FOR FAILURE TO  
PAY CIVIL FILING FEES  
MANDATED BY  
28 U.S.C. § 1914(a)**

**[Doc. No. 2]**

21 Plaintiff, currently committed at Patton State Hospital (“PSH”) in Patton, California, and  
22 proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Although  
23 difficult to decipher, Plaintiff’s Complaint alleges that San Diego County Sheriff Deputies “over  
24 medicated” him while he was incarcerated at George Bailey Detention Facility in 1995. (Compl.  
25 at 2-3.) Plaintiff seeks several million dollars in compensatory and punitive damages. (*Id.* at  
26 7.) Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a) to commence  
27 a civil action; instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to  
28 28 U.S.C. § 1915(a) [Doc. No. 2].

**I. Motion to Proceed IFP**

Section 1915 of Title 28 of the United States Code allows certain litigants to pursue civil litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C. § 1915(a)(2). However, the Prison Litigation Reform Act (“PLRA”) amended section 1915 to preclude the privilege to proceed IFP:

. . . if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief can be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’ provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005). “Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.* The objective of the PLRA is to further “the congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).

“‘Strikes’ are prior cases or appeals, brought while the plaintiff was a prisoner, which were dismissed ‘on the ground that [they were] frivolous, malicious, or fail[ed] to state a claim.’” *Andrews*, 398 F.3d at 1116 n.1. Thus, once a prisoner has accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other action IFP in federal court unless he is in “imminent danger of serious physical injury.” *See* 28 U.S.C. § 1915(g).<sup>1</sup>

While the PLRA does not require a prisoner to declare that § 1915(g) does not bar his request to proceed IFP, *Andrews*, 398 F.3d at 1119, “[i]n some instances, the district court docket records may be sufficient to show that a prior dismissal satisfies at least one of the criteria under § 1915(g) and therefore counts as a strike.” *Id.* at 1120. When applying 28 U.S.C. § 1915(g), however, the court must “conduct a careful evaluation of the order dismissing an action, and

---

<sup>1</sup> The Ninth Circuit has held that section 1915(g) does not violate a prisoner’s right to access to the courts, due process or equal protection; nor does it violate separation of powers principles or operate as an ex post facto law. *Rodriguez v. Cook*, 169 F.3d 1176, 1179-82 (9th Cir. 1999); *see also Andrews*, 398 F.3d at 1123 (noting constitutionality of § 1915(g), but recognizing that “serious constitutional concerns would arise if § 1915(g) were applied to preclude those prisoners who had filed actions who were not ‘frivolous, malicious, or fail[ing] to state a claim’ from proceeding IFP.”).

1 other relevant information,” before determining that the action “was dismissed because it was  
2 frivolous, malicious or failed to state a claim,” since “not all unsuccessful cases qualify as a  
3 strike under § 1915(g).” *Id.* at 1121. The Seventh Circuit likewise requires the district court to  
4 cite the specific case names, numbers, districts and dates of dismissal for each civil action it has  
5 determined to be a “strike” or “prior occasion.” *Id.* at 1120 (citing *Evans v. Illinois Dep’t of*  
6 *Corrections*, 150 F.3d 810, 811-12 (7th Cir. 1998)).

7 The Ninth Circuit has held that “the phrase ‘fails to state a claim on which relief may be  
8 granted,’ as used elsewhere in § 1915, ‘parallels the language of Federal Rule of Civil Procedure  
9 12(b)(6).’” *Id.* at 1121 (quoting *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)).  
10 *Andrews* further holds that a case is “frivolous” for purposes of § 1915(g) “if it is of little weight  
11 or importance” or “ha[s] no basis in law or fact.” 398 F.3d at 1121 (citations omitted); *see also*  
12 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (“[A] complaint, containing as it does both factual  
13 allegations and legal conclusions, is frivolous [under 28 U.S.C. § 1915] where it lacks an  
14 arguable basis in either law or in fact .... [The] term ‘frivolous,’ when applied to a complaint,  
15 embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.”). “A  
16 case is malicious if it was filed with the intention or desire to harm another.” *Andrews*, 398 F.3d  
17 at 1121 (quotation and citation omitted).

## 18 **II. Application of 28 U.S.C. § 1915(g)**

19 The Court notes as an initial matter that Plaintiff has alleged no facts to show that he is  
20 in imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g); *Rodriguez*, 169 F.3d  
21 at 1178; *see also Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998) (finding that “allegations  
22 that the prisoner faced imminent danger in the past” are insufficient to trigger section 1915(g)’s  
23 imminent and serious physical injury exception). Thus, regardless of Plaintiff’s financial status,  
24 he may not proceed IFP pursuant to 28 U.S.C. § 1915 if he has, on three prior occasions while  
25 incarcerated, had federal civil actions or appeals dismissed as frivolous or malicious or for  
26 failing to state a claim. *See* 28 U.S.C. § 1915(g); *Andrews*, 398 F.3d at 1119-20; *Rodriguez*, 169  
27 F.3d at 1178.

A court “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.” *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Here, the Court takes judicial notice that Plaintiff has had three prior prisoner civil actions dismissed in both the Southern and Central Districts of California on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A. See *Dekadu v. State of California*, S.D. Cal. Civil Case No. 04-2065 WQH (POR) (Jan. 4, 2005 Order Denying IFP and Dismissing Complaint sua sponte as frivolous per 28 U.S.C. § 1915A(b)(1) [Doc. No. 3]) (strike one); *Fekadu v. Cal. Dept. of Corrections*, S.D. Cal. Civil Case No. 04-2173 JM (NLS) (Jan. 3, 2005 Order Denying IFP and Dismissing Complaint sua sponte as frivolous per 28 U.S.C. § 1915A(b)(1) [Doc. No. 6]) (strike two); and *Fkadu v. Luna*, C.D. Cal. Civil Case No. 06-0323 AMS (SH) (Feb. 13, 2006 Order Denying IFP and Dismissing Complaint as legally and/or factually patently frivolous [Doc. No. 2]) (strike three).

Accordingly, because Plaintiff has, while incarcerated, accumulated three “strikes” pursuant to § 1915(g), and does not presently allege facts sufficient to show that he is under imminent danger of serious physical injury, the Court **DENIES** Plaintiff’s Motion to Proceed IFP [Doc. No. 2]. See *Andrews*, 398 F.3d at 1121; *Rodriguez*, 167 F.3d at 1178.


### **III. Conclusion and Order**

For the reasons set forth above, the Court hereby **DENIES** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(g) [Doc. No. 2] and **DISMISSES** the case without prejudice for failure to pay the full \$350 civil filing fee required by 28 U.S.C. § 1914(a).

The Clerk shall close the file.

**IT IS SO ORDERED.**

DATED: November 26, 2007

  
Hon. Jeffrey T. Miller  
United States District Judge